Blank Page

FILE COPY

Blank Page

INDEX

CITATIONS

Cases—Continued. Page

Blank Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 235

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LINK-BELT COMPANY

No. 236

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF CRAFTSMEN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1565–1574), and the opinion of Judge Treanor, dissenting in part (R. 1574–1580), are reported in 110 F. (2d) 506. The findings of fact, conclusions of law, and order of the Board (R. 1519–1556) are reported in 12 N. L. R. B. 854.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 13, 1940 (R. 1581–1582).[1] The petition for certiorari was filed on July 12, 1940, and was granted on October 14, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

The basic question presented is whether there is substantial evidence to support findings of the Board that the Link-Belt Company dominated, interfered with, and supported a labor organization of its employees, and that the company discriminated against certain of its employees in regard to hire and tenure of employment because of their union membership and activities.

Subsidiary questions encompassed in this inquiry are whether the Board might treat as evidence of company domination and support of a labor organization (1) the fact that the organization in question replaced an admittedly company-

[1] The decree was entered jointly in two distinct proceedings instituted under Section 10 (f) of the National Labor Relations Act for review of the Board's order. One of the proceedings was initiated by petition of the Link-Belt Company (R. 1–39), the other by petition of the Independent Union of Craftsmen (R. 45–54), a labor organization found by the Board to be company-dominated. In its answers to both petitions, the Board requested enforcement of its order against the company (R. 39–44, 54a–54d).

dominated predecessor without a substantial break in time or identity, and (2) solicitation of members for the successor labor organization on company property during working hours by certain supervisory employees of the company, and by other employees with the acquiescence of their supervisors.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings[2] the Board issued its findings of fact, conclusions of law, and order (R. 1519–1556). The Board's findings with respect to the unfair labor practices may be briefly summarized as follows:[3]

For some time before the enactment of the National Labor Relations Act, and for more than two years thereafter, Link-Belt Company (hereafter called the company) maintained and dominated, as it now concedes, an employees' representation plan (hereafter called the Plan) (R. 1524–1525). Between September 1936 and April 1937, however, a

[2] These, pursuant to Section 10 of the National Labor Relations Act, were charge (R. 91–92), complaint (R. 55–60), answer (R. 96–98), hearing before a trial examiner, intermediate report of the examiner (R. 1469–1488), exceptions thereto (R. 1489–1517), the filing of a brief, and oral argument before the Board (R. 1519).

[3] The evidence supporting these findings, except those upheld by the court below and not in issue in this Court, will be discussed in the Argument, *infra*, pp. 11–59.

large number of the company's employees joined the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1604 (hereafter called the Amalgamated) (R. 1525). Upon learning on April 12, 1937, that this Court had sustained the constitutionality of the National Labor Relations Act,[4] four employees, two of whom were employee representatives under the Plan, initiated the Independent Union of Craftsmen (hereafter called the Independent), primarily because of their hostility toward the Amalgamated (R. 1526–1527). Membership petitions, hectographed on a company machine, were circulated during working hours by Plan representatives and other employees; a number of the company's foremen themselves took an active part in soliciting signatures, and over 700 employees were signed up during a period of three days (R. 1527, 1529–1533). On April 19, after the Independent's membership drive had been successfully concluded, the employee representatives under the Plan and the management representative dissolved the Plan (R. 1528). On the same day, the Independent requested recognition as the employees' exclusive bargaining representative, and two days later such recognition was granted by the company (R. 1527–1528). The Board concluded that the company had dominated and interfered with the formation

[4] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

and administration of the Independent and had contributed support to it (R. 1534–1535).

For 20 years the company engaged in industrial espionage through a labor spy supplied by the National Metal Trades Association, until, in May 1937, exposure of the spy by the United States Senate subcommittee on civil liberties ended his usefulness (R. 1535–1537).

In September 1936, the company discharged an employee, Salmons, because of his membership and activity in the Amalgamated, and another employee, Novak, because it mistakenly believed that he was active in the Amalgamated (R. 1525–1526, 1537–1540, 1550). In April 1937, the company required Peter Solinko, an employee, to join the Independent as a condition of employing his son, Frank Solinko (R. 1532–1533, 1550), and during the following month two employees, Karbel and Cumorich, were discharged because they refused to join the Independent and joined the Amalgamated (R. 1542–1544). Finally, the company discharged an employee, Kalamarie, in November 1937, because of his activity in the Amalgamated (R. 1547–1549).

Upon these findings, the Board ordered the company to cease and desist from the unfair labor practices found, to withdraw recognition from and disestablish the Independent, to make Novak whole for loss of pay suffered by him by reason of his discriminatory discharge, to offer Karbel, Cumo-

275986—40——2

rich, and Kalamarie reinstatement with back pay, and to post appropriate notices (R. 1553–1556).[5]

Thereafter the company and the Independent filed separate petitions in the court below to review and set aside the Board's order (R. 1–39, 45–54). The Board answered, requesting full enforcement of its order against the company (R. 39–44, 54a–54d).

The court sustained the Board's findings and order as to labor espionage and as to Novak, but set aside, as unsupported by substantial evidence, the findings as to the Independent, and as to Salmons, Karbel, Cumorich, Kalamarie, and the Solinkos (R. 1565–1574). Accordingly the court entered a decree (R. 1581–1582) on April 13, 1940, which failed to enforce paragraphs 1 (a) and 2 (a) of the Board's order (R. 1554), requiring the company to cease and desist from dominating or interfering with the Independent and to withdraw recognition from that organization as a collective bargaining representative of the employees, and which likewise failed to enforce paragraph 2 (c) and (d) (R. 1555), directing the company to reinstate Karbel, Cumorich, and Kalamarie, with back pay. Judge Treanor dissented, except as to Kalamarie, from the refusal to enforce the reinstate-

[5] No affirmative relief was ordered as to the Solinkos or as to Salmons. Salmons had theretofore been reinstated by the company under an agreement that he would not receive back pay (R. 1540, 1551–1552). Novak had also been reinstated (*ibid.*).

ment and back pay provisions of the order, and from the refusal to enforce the cease-and-desist order as to the Independent, although he did not think the interference and domination sufficient in degree or of sufficient duration to warrant disestablishment, the usual affirmative relief (R. 1574–1580).* On October 14, 1940, this Court granted the petition for writs of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the following findings of the Board are not supported by substantial evidence:

(a) That the company dominated and interfered with the formation and administration of the Independent and contributed support to that organization;

(b) That the company discharged Salmons, Karbel, Cumorich, and Kalamarie because of their union membership and activity, and conditioned the employment of Frank Solinko upon Peter Solinko's joining the Independent.

2. In holding, in effect, that replacement of the

---

*Judge Treanor appears now to have receded from this view as to the circumstances in which disestablishment is permissible. In *A. E. Staley Manufacturing Co.* v. *National Labor Relations Board* (C. C. A. 7th, decided November 14, 1940), Judge Treanor, dissenting, stated that although it was a "close question," he thought that there was sufficient evidence to support the Board's finding of company domination, interference and support, and that "granting the correctness of the Board's finding such finding was adequate to support" the disestablishment order.

company-dominated Plan by an inside successor, the Independent, without a substantial break in time or identity, was not evidence of company interference with, and domination and support of, the Independent.

3. In holding that the company was not responsible for the activities of certain of its supervisory employees in soliciting members for the Independent on company property during working hours.

4. In refusing to enforce, and in setting aside paragraphs 1 (a), 2 (a), 2 (c), and 2 (d), and in modifying paragraph 2 (f) of the Board's order.

SUMMARY OF ARGUMENT

I

The Board's findings that the company dominated and interfered with the formation and administration of the Independent and contributed support to it in violation of Section 8 (1) and (2) of the Act are supported by substantial evidence.

In broad outline, the evidence shows: For several years and until April 1937 the company maintained an employees' representation plan which was admittedly violative of the Act. And in the autumn of 1936, when the Amalgamated appeared in the plant, the company discharged the Amalgamated's leading employee organizer and his supposed associate because of their union membership and activity. On April 12, 1937, the day this Court upheld the Act, Plan representatives and other employees hostile to the Act and to the Amal-

gamated initiated the Independent, another "inside" union. In an intensive 3-day membership drive, conducted openly and extensively on company time and premises without company objection, the Independent enrolled 760 members out of a total of about 1000 employees in the plant. Plan representatives took a prominent part in the campaign and supervisory employees participated. After the successful conclusion of this drive, the Plan was dissolved; on the same day the Independent requested exclusive recognition. This was promptly granted by the company prior to the Independent's first membership meeting; the latter was presided over by a former Plan representative and attended by supervisory employees.

The evidence thus outlined amply supports the Board's ultimate findings that the company dominated, interfered with, and supported the Independent. *International Association of Machinists* v. *National Labor Relations Board*, No. 16, this Term, decided November 12, 1940; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *System Federation No. 40* v. *Virginian Ry. Co.*, 11 F. Supp. 621, affirmed, 84 F. (2d) 641 (C. C. A. 4th), affirmed, 300 U. S. 515; *Westinghouse Electric & Mfg. Co.* v. *National Labor Rela-*

tions Board, 112 F. (2d) 657 (C. C. A. 2d), certiorari granted, No. 447, this Term; *National Labor Relations Board* v. *Swift & Co.*, decided November 20, 1940 (C. C. A. 8th). Likewise it warrants the Board's order requiring the company to cease and desist from such domination, interference, and support and to disestablish the Independent as a bargaining representative. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318.

II

The Board's findings that the company, in violation of Section 8 (1) and (3) of the Act, discharged Salmons, Karbel, Cumorich, and Kalamarie because of their union membership and activity, and required Peter Solinko to join the Independent as a condition of employing his son, Frank Solinko, are supported by substantial evidence. The company's explanations of the discharges and its denial that it imposed any condition upon the hiring of Frank Solinko, were not, in view of the circumstances and of the evidence as a whole, entitled to be credited by the Board.

ARGUMENT

I

The findings of the Board relating to the Independent are supported by substantial evidence, and the disestablishment order was proper

A. The Board's findings of fact are supported by substantial evidence

The Board found that the company had dominated and interfered with the formation and administration of the Independent and contributed support to it in violation of Section 8 (1) and (2) of the Act (R. 1534–1535, 1553). While the testimony upon which the Board's subsidiary findings of fact are based is in large part controverted, we submit that they are supported by evidence which is plainly "substantial" within any proper meaning of that term. Yet the Court of Appeals, ignoring or rejecting the Board's evidentiary findings and substituting its own views of the credibility of witnesses and the weight of the evidence for those of the Board, concluded that there was lacking "any evidence" from which company domination, interference, or support could be inferred (R. 1570). We submit that the court was clearly in error and that the Board's findings are amply supported, as the following review of the evidence will demonstrate.

The Employees' Representation Plan and company hostility to "outside" organizations.—The company concededly set up the Plan, an "inside" labor organization, in 1933 "in the conventional manner" (R. 147) to "cooperate with the spirit

of the N. I. R. A." (R. 1127, 146–147, 204, 1194, 1926–1301, 1335)[7]. The Plan's structure and operation were such that, in the phrase of Plant Manager Berry, "it was a part of the company" (R. 1197–1198);[8] upon the passage of the National Labor Relations Act in 1935, the Plan became manifestly illegal, as the company conceded at the hearing (R. 147, 1195, see also R. 823). The company nevertheless continued to maintain the Plan.

At the same time, the company demonstrated its hostility toward "outside" organization. In

[7] At the time the company established the Plan, hundreds of employers throughout the United States were introducing similar devices as "a concession to the mandate of Section 7 (a) of the National Industrial Recovery Act." *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 474 (C. C. A. 3d), modified on another point, No. 14, this Term, decided November 12, 1940. See Daugherty, *Labor Problems in American Industry* (Rev. Ed. 1938), p. 643; Daugherty, DeChazeau, and Stratton, *The Economics of the Iron and Steel Industry* (1937), vol. II, pp. 1005, 1151; U. S. Department of Labor, Bulletin No. 631, *Characteristics of Company Unions, 1935* (U. S. Govt. Printing Off., 1938), pp. 27–28, 50, 78; Senate Report No. 573 (74th Cong., 1st Sess.), p. 11; House Report No. 1147 (74th Cong., 1st Sess.), p. 17.

[8] The Plan's stated purpose was merely to let the management "know the wishes" of the employees (R. 1296); all employees on the pay roll for 90 days automatically became members (R. 1297); foremen sometimes served as employee representatives (R. 149, 184, 205, 1297); elections of the employee representatives and meetings of the employees' board took place on plant premises (R. 1196, 1299); the company could dissolve the Plan on 3 months' notice and also held a veto power over amendments (R. 1301); and all expenses of the Plan throughout its existence were paid by the company (R. 1197).

the summer of 1936, Manager Berry admittedly informed the Plan's board of employee representatives that if "outside people came into our plant and told us how to run the plant, then I had enough of industry" (R. 1198, 1203, 166–167, 170). The forcible sanctions behind these words were soon made clear. In September 1936, Salmons, an employee representative who had become dissatisfied with the Plan, initiated the formation of a lodge of the Amalgamated, an outside organization affiliated with the Steel Workers Organizing Committee (R. 152–153, 189–190). On September 21, the day following the Amalgamated's first organizing meeting for the company's employees, Berry summoned Salmons to his office, charged him with "spreading union propaganda," and discharged him with orders to leave the company's property in "half an hour" (R. 153, 169). On the same day, an employee named Novak, whom Berry mistakenly believed to have joined and organized for the Amalgamated, was likewise discharged; Berry accused Novak of being "an organizer and instigator for a union" and gave him, like Salmons, a "half an hour" to get out (R. 217–218, 699). The Board found that these discharges violated Section 8 (1) and (3) of the Act.[9]

The discharges of Salmons and Novak were not

[9] The court below upheld the Board's findings as to Novak, but set aside those as to Salmons. The evidence supporting the Board's findings as to the discharge of Salmons is discussed in detail *infra*, pp. 45–50.

the only obstacles which the company interposed to outside organization. In January 1937, a labor spy, whom the company had employed through the National Metal Trades Association for more than 20 years, joined the Amalgamated, attended its meetings, and became a committeeman (R. 112–113, 137–138, 145–146); he resigned precipitately when exposed a few months later by the La Follette Senate subcommittee (R. 122–125, 129, 138, 1294–1295.[10] Despite these evidences of company hostility, the Amalgamated continued its membership campaign, and by April 1937 had enrolled about 400 employees (R. 206–208, 1234).

The initiation of the Independent.—The company continued to maintain the Plan, despite its patent illegality under the Act, until after the April 1937 decisions of this Court sustaining the Act. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases. While these cases were pending, a number of employees had discussed the formation of another inside organization, if decisions favorable to the Act made that "necessary," to insure against being "burdened by any outside influences" (R. 714–715). On April 12, the day the Act was upheld, two of these employees, John Litster and Hubert Bricks, both employee representatives

[10] The Board's findings concerning the company's industrial espionage in violation of Section 8 (1) of the Act (R. 1535–1537) were upheld by the court below (R. 1572), and hence are not in issue in this Court.

under the Plan (R. 1345, 1413), conferred with George F. Linde and Arthur H. Rosenberg, two other employees (R. 715). As Linde testified, the group was "dismayed" by the decisions; they "had banked [their] hopes that it [the Act] would be declared illegal" (R. 715, 758–759). To meet the unwelcome situation, the four men immediately set to work to form the Independent.

That night Linde and Plan Representative Brucks drafted a form of membership petition (R. 716, 760), and the next day, at the request of another Plan representative, William J. Greenlee (R. 1345), the petitions were hectographed after working hours on a company machine (R. 717, 1040–1044, 1420–1430). The chairman of the Plan, Ray Froling (R. 821, 1345), was added to the organizing committee (R. 810). On April 14, 15, and 16, Plan representatives and others circulated the petitions throughout the plant during working hours, engaging in open and extensive solicitation of members for the Independent. Every one of the Plan representatives, i. e., Froling, Brucks, Lackhouse, Greenlee, Bailey, and Litster (R. 1413), admittedly participated in the solicitation (R. 285–286, 291–292, 796, 800, 803, 815–819, 829, 875, 880–881; see also R. 165, 168, 344–346, 570, 578–579, 914–915, 1060). Froling, the Plan chairman, though an evasive witness (see R. 816–819), virtually admitted that he solicited the entire machine shop, "from 110 to 120" men, dur-

ing working hours (R. 818–819).[11] Representative Lackhouse testified that he carried a list through the plant all one afternoon and obtained some 40 signatures (R. 285–286, 291–292). Representative Greenlee, according to a witness for the Independent, was "going around with lists * * * on company time talking to the men" (R. 914–915; see also R. 165, 168, 570, 578–579, 1060). Kowatch, an employee, testified that his foreman allowed him to take time off without pay during working hours and that he thereupon solicited "practically every man in the foundry, about 300" men, proceeding systematically from man to man (R. 864, 858). Another employee, Petrouski, according to uncontroverted testimony, carried a list "through all the departments * * * all day long, and * * * stayed overtime that night to sign up some of the night men" (R. 286; see also R. 306, 425, 469, 529, 533, 539)[12] From the character and extent of the solicitation, the Board drew the inference (R. 1529, 1533) that the members of the supervisory

[11] Froling also testified that his foreman made no objection to his repeated absence from his machine (R. 815–816).

[12] A number of other witnesses admitted that they had participated in the membership campaign during working hours (R. 750, 831, 851, 855–856, 902, 906, 921, 924–925, 1058). Timekeeper Erickson, according to one witness, "just went along the line there, every man he came to" (R. 349; see also R. 266–267, 456, 490, 495). Erickson denied that he engaged in solicitation (R. 883) and the Board did not resolve the conflict.

staff generally were aware of and permitted the campaign.[13]

Some of the supervisory employees, indeed, did not confine themselves to mere acquiescence. According to controverted testimony credited by the Board (R. 1529–1533), they actively participated in the solicitation of members for the Independent. Siskauskis, a foreman (R. 314, 1049), urged his men to sign the Independent petitions, himself signed for illiterate employees (R. 285–286, 289–290, 297–298, 314, 329, 338, 540–542, 544–549, 659, 674), and threatened a number of employees with discharge unless they signed (R. 659, 541).[14] Lack-

[13] In the court below the company sought to rebut the inference of supervisory staff toleration by citing five isolated instances in which supervisors stopped solicitation by Independent organizers. Even this figure is misleading for one cited instance (Froling) did not occur until a month after the organizing drive for the Independent, and after it had been recognized and intrenched in the plant (R. 822, 827); another (Kresge) likewise occurred subsequent to the initial drive, when the lists used at first had been replaced with permanent membership cards (R. 871); and a third (Linde) similarly relates to a later period when the Independent had been set up and was collecting dues (R. 781). With the exception of the belated reprimand to Froling, none of the reprimands was administered to any of the large-scale organizers (*supra*, pp. 15–16). In any event, these incidents lose all significance in the light of the manifold instances in which nothing was done.

[14] Siskauskis admittedly attended the subsequent organizing meeting of the Independent (*infra*, p. 21); he voiced hostility to the Amalgamated (R. 440–441, 470); and he proved to be an unreliable witness (*infra*, p. 21). The

house, a Plan representative, after being asked by Plan Chairman Froling to circulate the petitions for the Independent, was given permission by his foreman, Nyberg, to stop work and solicit; when he did not start the solicitation immediately, Assistant Superintendent Olson called Lackhouse from his work and expounded the advantages of an "inside" union; thereupon Lackhouse stopped work and solicited signatures all afternoon (R. 283–285, 291–293, 303).[15] Uncontradicted testimony establishes that Belov, a night boss, solicited all the employees on the night shift during working hours (R. 410–411, 417, 561, 568, 630–631, 1025); according to Kalamarie, an employee whose testimony was credited by the Board (R. 1531), Belov did so upon written instructions left him by Foreman McKinney (R. 622–623, 631–632, 637–638).[16]

Board was therefore plainly warranted in accepting the overwhelming direct testimony cited in the text over Siskauskis' cover-all denial that he had engaged in solicitation (R. 1050).

[15] The testimony is Lackhouse's, and finds corroboration in the testimony of other witnesses that Lackhouse made similar statements at the time he was soliciting (R. 425, 527–528). Nyberg did not testify. Olson at first denied Lackhouse's testimony unqualifiedly (R. 1045), but under cross-examination admitted, hesitantly, that he had conversed with Lackhouse about a "rumor" that the Independent was being formed (R. 1048). The Board, characterizing Olson's testimony as "evasive and contradictory," accepted Lackhouse's version (R. 1529).

[16] Kalamarie's testimony was that Belov exhibited the instructions to him. Belov did not testify. McKinney denied leaving such instructions (R. 1063), but admitted that

Lastly, Employment Manager Staskey hired Frank Solinko only after instructing his father, Peter Solinko, to permit Kowatch (*supra*, p. 16) to enroll him, Peter, in the Independent, which Peter did (R. 242–253, 265–266, 269–270); the Board found that Frank Solinko's employment was conditioned upon his father's acquiring membership in the Independent, in violation of Section 8 (1) and (3) of the Act (R. 1532–1533)[17]

---

he customarily left written instructions for Belov concerning what he wanted done on the night shift (R. 1070–1071). In view of McKinney's inconsistent testimony in other respects (compare, for example, R. 1095 with R. 1085) and the company's failure to call Belov as a witness, the Board accepted Kalamarie's testimony (R. 1531).

[17] The Board credited the cited testimony of the two Solinkos over a different version given by Staskey and over Kowatch's denial of any participation in the incident. (R. 995–996, 857–858). The court below, pointing to what it interpreted as testimony by Frank Solinko that the conversation between Peter Solinko and Staskey about the Independent did not take place on the day Frank was hired but about two months before that, held (R. 1571) that the evidence "does not reasonably support" the Board's findings as to the Solinkos. Frank's testimony does not, we submit, stand this interpretation (see R. 264–265), and no other valid ground is set forth in the opinion which would warrant the court's substitution of its own views concerning the credibility of witnesses for those of the Board. The court added that even if the conversation between Peter Solinko and Staskey took place on the day Frank Solinko was hired, "then it was after the Independent had been recognized by the company as the bargaining agent of the employees. No inference unfavorable to the company can be reasonably drawn from these facts" (R. 1571–1572). But conditioning Frank's hiring upon Peter's joining the Inde-

The pressure thus applied upon the men proved effective. By April 16, in the short space of three days, 760 employees of the 1,000 in the plant had been enrolled in the Independent (R. 718, 725, 760, 797).

The dissolution of the Employees' Representation Plan and recognition of the Independent as exclusive bargaining representative.—The Plan remained in existence until the Independent's membership drive was successfully completed. On April 17, an attorney was retained who drafted a constitution for the new organization (R. 719–720, 1314–1317), and the next day, at a meeting attended by seven employees, including Linde, Plan Chairman Froling, Plan Representative Litster, and Plan Representative Brucks, it was decided both to dissolve the Plan and to seek recognition of the Independent (R. 720–721, 1269–1270, 1315–1316). Accordingly, on April 19, the Plan's board of employee representatives, all of whom had participated in organizing the Independent, entered into an agreement with Plant Manager Berry dissolving the Plan (R. 1413, 822–823, 824, 1141–1142, 1195–1196); on the same day Linde, Froling and Litster presented the Independent membership petitions to Berry and asked exclusive recognition

---

pendent was not any the less a violation of Section 8 (3) or "support" for the Independent within the meaning of Section 8 (2) whether it occurred after or before the recognition of the Independent. Such discrimination is permissible only pursuant to a valid closed-shop agreement, absent here.

for that organization (R. 724, 1143–1144). The request for recognition was granted on April 21 (R. 722, 763, 1148, 1180, 1420).

Not until after it was recognized did the Independent hold its first membership meeting (R. 427, 730, 763, 780). This took place on April 22; Lister, one of the employee representatives under the Plan, acted as chairman of the meeting (R. 732, 734, 790), and at least two supervisory employees, Foreman Grenis and Foreman Siskauskis, attended (R. 435–436, 641, 649).[18] At the meeting the work of the organizers was ratified and the constitution adopted (R. 734–735, 792, 837). Shortly thereafter the Independent held its first elections. While, as the court below emphasized (R. 1569), none of the men elected as officers was a former representative under the Plan, the undisputed fact is that two of the three delegates elected to the Independent's executive council, who control the Independent's policies and are of higher rank than the officers, had been Plan representatives—Chair-

[18] The testimony concerning the foremen's attendance is uncontroverted. Grenis did not testify. Siskauskis, admitting his attendance, testified that he happened to pass by the meeting hall not knowing that the Independent was holding a meeting, saw a crowd in which he "didn't recognize nobody," and "sneaked" in to see what was going on (R. 1057, 1051). The incredibility of this explanation need not be labored. Announcements of the meeting had been scattered all through the plant (R. 730); moreover, Siskauskis, a foreman for 22 years (R. 1049), could scarcely have failed to recognize some among the crowd of 500 employees (R. 731, 790).

275986—40——4

man Froling and Representative Litster (R. 737, 794–795, 807).

Thereafter, Independent notices were customarily posted on seven or eight bulletin boards in the plant (R. 319–320, 766, 804).[19] Though the Independent subsequently engaged in bargaining conferences with the company and obtained a 5-percent wage increase and certain other improvements in working conditions, it failed to secure a signed agreement; when the terms of a contract had been agreed on and reduced to writing (R. 1460–1464) ready for signature, the company at the last moment refused to sign it; thereafter the company issued a unilateral "statement of policy" (R. 1464–1467) to continue "until terminated, modified, or amended," apparently at the company's pleasure (R. 743–746, 1151).[20]

B. On these facts the Board properly concluded that the company dominated, interfered with, and supported the Independent

Upon the foregoing facts the Board's ultimate findings that the company dominated, interfered with, and supported the Independent in violation of Section 8 (1) and (2) of the Act (R. 1534–1535, 1553) are clearly supported by substantial evidence.

---

[19] The bulletin boards were manufactured in the plant, upon instructions given by Foreman Carlson, at the request of Kowatch, who paid for the labor and materials (R. 320–321, 863, 866).

[20] Attendance at the Independent's meetings dwindled from over 500 at the original meeting (R. 731, 790) to an average of 40 or 45 at the time of the hearing (R. 778–779).

1. The evidence shows that the company, immediately upon the Act's being held constitutional by this Court, utilized the employees' subservience to its wishes, which it had long obtained and assured through the Plan, to secure the substitution of another inside union. In the eyes of the employees, the Independent represented no break with the past but merely a continuation of the Plan; as the chairman of the Plan admitted at the hearing, the Independent was but a "substitution" designed to "take the place of" the Plan because "the Wagner Act was declared constitutional and that threw the Employees Board out" (R. 825). The impetus given to the Plan by the company's open domination, interference, and support plainly carried over to its successor.[21]

The creation of the Independent may not be viewed as if it occurred in a vacuum. The company had cogently, though unlawfully, manifested its determination to control the bargaining of the employees through an organization which was

[21] The setting up of hundreds of representation plans and company unions following adoption of the N. I. R. A. (note 7, p. 12, *supra*), found its counterpart, following the *Jones & Laughlin* decision, in the transformation of these organizations in large numbers into "inside unions" of less obvious illegality, but nonetheless dominated by their creator and transformer. See cases collected in *Third Annual Report of the National Labor Relations Board* (U. S. Government Printing Office, 1939), pp. 124–125; *Fourth Annual Report of the National Labor Relations Board* (U. S. Government Printing Office, 1940), pp. 71–73; Daugherty, *Labor Problems in American Industry* (Rev. Ed. 1938), p. 644.

admittedly "a part of the company" (*supra*, p. 12). During the four years preceding transformation of the Plan into the Independent, it had conditioned its employees to that type of organization: when men had entered the company's employ they had automatically become members of the Plan, regardless of their choice. The Board was entitled to find that "the effects of the long practice cannot be eliminated and the employees rendered entirely free to act upon their own initiative without the complete disestablishment of the plan." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250. Particularly was this true when, as here, the company had not confined its hostility to "outside" organizations to creation and maintenance of the Plan, but had discharged the Amalgamated's leader and his supposed assistant as soon as an attempt was made to introduce that organization into the plant (*supra*, p. 13). In the face of such drastic action, the employees were bound to keep their feet firmly planted on the path of inside unionism; even "slight suggestions as to the employer's choice among unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Ass'n. of Machinists* v. *National Labor Relations Board*, No. 16, this Term, decided November 12, 1940.

The formation of the Independent and its substitution for the Plan were not preceded or accom-

paried by any action by the company to erase the effects of years of domination. When the hope of unconstitutionality was dissipated, the company adopted no effective means "of wiping the slate clean and affording the employees an opportunity to start afresh in organizing for the adjustment of their relations with the employer." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250. It took no steps, by publicly disestablishing the Plan, by public announcement of neutrality, or otherwise, to assure its employees that a sharp turning point had come, that it would abandon its efforts to control their choice of bargaining representatives, and that they were free thenceforward to decide for themselves whether they preferred to form another inside union, to join an affiliated union, or to have no representative. On the contrary, the company left intact the compulsions arising from the dominated Plan the while a "new" inside organization was hastily rigged up, largely by Plan representatives, and substituted for the Plan as the employees' exclusive bargaining representative.

The Board may properly find, we submit, that in the complete absence of any effective action by the employer repudiating the past and providing adequate reassurance for the future, a "new" inside union immediately succeeding a long-dominated inside union, and formed with the prominent participation of the old union's leaders, does not represent the free choice of the employees. It is no sufficient

answer that the employer may have refrained from engaging in new acts of interference and support coincident with the appearance of the successor. It is clear, we think, that passivity alone may not be enough to eliminate the constraints engendered by the employer's past conduct; hence he is also obligated under the Act to take whatever affirmative action may be necessary to release his employees from the compulsions to which he has subjected them. The Act is designed not only to restrain present violations, but to remove or avoid "the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236. Where one of the consequences of past violation is the employees' settled conviction that the employer desires a particular type of organization, the employer must take appropriate steps to disabuse the employees of this notion before they are truly free to exercise an unimpeded choice between that type of organization and any other. And whether, in a particular case, the action taken by the employer is sufficient for this purpose, is, of course, a question of fact entrusted to the Board for determination. *Western Union Telegraph Co.* v. *National Labor Relations Board,* 113 F. (2d) 992, 996–997 (C. C. A. 2nd); compare *International Ass'n of Machinists* v. *National Labor Relations Board,* No. 16, this Term, decided November 12, 1940.

In the present case, the company took no action whatever to counteract the employees' belief in the company's continued backing of the Plan and of the brand of unionism for which it stood. It was inevitable, therefore, that the employees would regard the mass shift of the Plan's leaders to the Independent as soon as it became necessary to scuttle the Plan because of the *Jones & Laughlin* decision, and their activity in obtaining employee adherence to the Independent (*supra*, pp. 14–22), as meaning what the Plan chairman believed—that the Independent was merely the Plan in new garb designed to make it "legal." In the absence of public withdrawal of company backing from the activities of the representatives so long prominently identified as a part of the company's existing apparatus for controlling the union affiliations of its employees, the employees would naturally regard the new organization which they were sponsoring as continuing to enjoy the company's favor and support. The Board was plainly justified in finding that "The employees of the respondent of necessity must have linked the successor organization to the admittedly illegal Plan and thus to the respondent because of the identity of leading figures in the Plan and the Independent. * * *" (R. 1534).

Manifestly, the Independent, created under such conditions, did not represent the employees' unfettered choice. In *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations*

Board, 112 F. (2d) 657, certiorari granted, No. 447, this Term, the Circuit Court of Appeals for the Second Circuit based its decision sustaining the Board's findings of employer interference with and support of an inside union upon the fact that the inside union succeeded an illegal employee representation plan "without any line of fracture, at least on the surface." The court pointed out that the Plan had not been openly disavowed by the employer and that the employer had permitted its known favor for the Plan to be carried over to the successor organization. It said (112 F. (2d), at 660–661):

> The theory is that in cases such as this where an unaffiliated union seems to the employees at large to have evolved out of an earlier joint organization of employer and employees, the Board may take it as datum, in the absence of satisfactory evidence to the contrary, that the employees will suppose that the company approves the new, as it did the old, and that their choice is for that reason not as free as the statute demands * * * the company did not make any effort to make it plain to the employees generally that the "Independent" was not a revision, or amendment, of the "Plan." On the surface it seemed to be such, for it emanated from the old elected representatives, and that alone established an appearance of continuity between the two. * * * So far as appears, [the company] was con-

> tent to let them assume, what was true, that the "Independent" had arisen out of the "Plan"; and to believe, as they quite naturally might have done, that it preferred the successor to the C. I. O. local just forming, and still very feeble.

See, also, the decisions of the Second Circuit in *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 68, modified and affirmed, 309 U. S. 629; *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992, 996–997.

So, too, the Circuit Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Swift & Co.*, decided November 20, 1940, sustained Board findings that an inside union immediately following an illegal employee representation plan and evolved under the direction of the leaders of the antecedent organization, was illegal despite an intervening posted declaration by the employer that the first organization could not be continued. The court said:

> The inquiry of the Board concerned the situation in which the workers of respondent had long been associated in an organization in which half of the members of its representative body had been chosen by the respondent. The active and directing heads of the organization had supervisory authority over some of the workmen. The respondent had posted in the plant its

declaration to the workmen in writing that as the Supreme Court had construed the National Labor Relations Act, it was "not possible to continue the organization," and such was manifestly the fact. In that situation the requirements of the Act were that there be complete restoration to the workers who had been associated in the organization of full freedom to exercise their right of self-organization. *N. L. R. B.* v. *Newport News Shipbuilding Co.*, 308 U. S. 241, l. c. 250. The facts here found by the Board upon sufficient evidence fairly support the inference that such full freedom was not restored and that advantage was taken by the employer of the existing organization and of the authority of certain members of its Assembly which adhered to them by reason of their offices in that organization. The acts of assistance and interference on the part of respondent in the organization of the new labor organization could not be judged in isolation by themselves alone. If that were possible, the holding would have to be that the acts did not amount to the domination or interference prohibited by the Act. But only a few days intervened between the respondent's posting its declaration of the impossibility of continuing the old organization and the completion of the new organization and the recognition thereof by the employer. The facts found by the Board upon substantial evidence sufficiently sustain its finding that there was a material degree of interference and domination on the part of the respondent in the formation

> and administration of the new labor organization.

See, also, *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 344–347 (C. C. A. 8th); *National Labor Relations Board* v. *Rath Packing Co.*, decided October 31, 1940 (C. C. A. 8th).

In addition to the Second and Eighth Circuits, the Third, Fifth, and Tenth Circuits, and even in one case the court below (the Seventh Circuit), have likewise, in enforcing orders requiring the disestablishment of inside unions formed in the spring of 1937 to succeed precedent employee representation plans, attached significance to the circumstance that persons active in the transformation had been officers or representatives under the old plans.[22] And in *System Federation No. 40* v.

[22] *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587, 591 (C. C. A. 3d); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 476–477 (C. C. A. 3d), modified on another point, No. 14, this Term, decided November 12, 1940; *Texas Co.* v. *National Labor Relations Board*, 112 F. (2d) 744 (C. C. A. 5th); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 985–986 (C. C. A. 7th), certiorari denied, No. 152, this Term; *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 92–95 (C. C. A. 10th); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 483–484 (C. C. A. 10th), pending argument on another point, No. 413, this Term. The Report of the House Committee on Labor on the bill which became the Act refers to employee representatives under a company-dominated plan of employee representation as "an active group of propagandists among the employees for the type of employee representation the company would prefer to deal with." H. Rept. No. 1147, 74th Cong., 1st Sess., p. 18.

Virginian Ry. Co., 11 F. Supp. 621, affirmed, 84 F. (2d) 641 (C. C. A. 4th), affirmed, 300 U. S. 515, the decree directing disestablishment of the second in point of time of the two labor organizations there alleged to be company dominated, rested largely upon evidence that one Hearne, while an officer of the first organization, helped to organize the second and became its General Chairman (11 F. Supp., at 627).[23]

In *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 43, the Court of Appeals for the District of Columbia, approving findings by the Board that employees who had previously organized a company union were subsequently active in introducing and obtaining employee acceptance of an A. F. of L. affiliate which the employer favored, held that the employer was answerable for the coercive acts of those employees. It said:

> Acme Welfare was a company union. It follows necessarily that its leading promoters were company representatives. Men accustomed to such submission seldom regain

[23] It is no answer to point out, as the company did in the court below, that Salmons, the initiator of the Amalgamated, was likewise a representative under the Plan. Salmons was acting in open rebellion against the then-entrenched Plan, and his sponsorship of the Amalgamated, unlike the activity of his fellow representatives on behalf of the Independent, was promptly met with discharge. Plainly, no employee could for a moment suppose that Salmons' connection with the Amalgamated connoted company approval of that organization.

> independence overnight. The interval, if there was one, required for the transfer of allegiance * * *, from Acme Welfare and the company to I. A. M. was too brief for disruption of the old and basic loyalty. The evidence supports the conclusion that it was not disrupted, but continued, though manifested in less obvious but more effective form. All that they did, therefore, is imputable to the company.

Similarly this Court, in affirming the judgment of the Court of Appeals, held that the Board might properly take into account "the fact that the employee-solicitors had been closely identified with the company union until their quick shift to petitioner" (the A. F. of L. affiliate). No. 16, this Term, decided November 12, 1940.

The foregoing principles were entirely disregarded by the court below in the present case. Rather, its opinion treated the facts in such a way as to render these principles inapplicable. Thus, although noting that the company had defrayed all expenses of the Plan (R. 1567), there is no recognition in the opinion that the company's maintenance of the Plan from July 5, 1935, until April 19, 1937, violated the Act. Nor apparently did the court regard the findings concerning the discharge of Novak and the 20 years of industrial espionage, which it accepted (R. 1572), as evidencing company hostility toward the Amalgamated; instead, it referred (R. 1570) to testimony (R. 282) by an organizer for the Amalgamated that he had never

heard Manager Berry say anything hostile to that union, evidence surely of insignificant probative force. The extensive participation by all the employee representatives under the Plan in initiating the Independent and obtaining its acceptance by the employees, was entirely ignored by the court. This omission, coupled with the court's remark that Linde, one of the organizers, "had never approved of the Employees Representative Plan" (R. 1568), wholly distorts the record. Likewise, the court did not mention the continued existence of the Plan during the period when the employees were being herded into the Independent, or the fact that the Plan's termination was timed to the day with the Independent's demand for recognition; it merely noted, attributing no weight to what occurred before the grant of exclusive recognition and obscuring the fact that the two events were almost simultaneous, that "the undisputed evidence discloses that the Employees Board was completely dissolved and abandoned prior to the recognition of the Independent" (R. 1570).

2. The considerations which we have already stated establish, we submit, the illegality of the Independent even had the company altogether refrained from new acts of interference and support coincident with the formation of the Independent. In fact, however, the company's conduct at that time additionally stamped the dominated character of the Independent. Thus, the open, systematic,

and exhaustive solicitation which the company allowed the Independent's organizers to carry on throughout the plant during working hours without interference by the supervisory staff (*supra*, pp. 15–17), is a recognized hallmark of employer support to a labor organization and interference with its affairs. E. g., *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 333–335; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 250, 262, enforcing 5 N. L. R. B. 930, 935, 946–947.[24] "The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign promises." *International Ass'n of Machinists* v. *National Labor Relations Board*, No. 16, this Term, decided November 12, 1940.[25]

---

[24] Accord: *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254, 258 (C. C. A. 3rd), certiorari denied, 308 U. S. 615; *National Labor Relations Board* v. *Wallace Mfg. Co.*, 95 F. (2d) 818, 820 (C. C. A. 4th); *National Labor Relations Board* v. *Lane Cotton Mills*, 111 F. (2d) 814, 816 (C. C. A. 5th), pending decision on petition for certiorari, No. 508, this Term; *H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. (2d) 843, 847 (C. C. A. 6th), pending argument, No. 73, this Term; *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 986 (C. C. A. 7th), certiorari denied, No. 152, this Term; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 52 (C. C. A. 8th); cf. *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 560.

[25] The court below disposed of the wholesale solicitation on company time and property by stating that "some of the

So, too, the direct participation in the Independent membership campaign of Foreman Siskauskis, Assistant Superintendent Olson, Foreman Nyberg, Foreman McKinney, Night Boss Belov, and Employment Manager Staskey (*supra*, pp. 17–19), clearly establishes company domination,

---

signatures were obtained during working hours, but the majority were obtained outside of working hours" (R. 1568). This statement was apparently based on the testimony of Linde, one of the organizers of the Independent, that "a few" signatures were obtained during working hours but that the "great majority" of the names were signed before or after work, or at noon (R. 717). While this testimony was not directly controverted, it seems of doubtful veracity in view of the wholesale solicitation on company time. See *supra*, pp. 15–20. The Board made no finding as to whether the majority of the signatures were obtained during working hours, and that issue is, in any event, plainly beside the point: it is not essential that the solicitation on company time also result in the final act of signing on company time, whether by a majority, or by any, of the employees in order for its occurrence to support findings that Section 8 (2) was violated.

The court also minimized the extensive and systematic solicitation on behalf of the Independent by finding that both the Amalgamated and the Independent organizers "engaged to some extent in union activities on company time" (R. 1569). While there was some solicitation on behalf of the Amalgamated during working hours (R. 862, 894–895, 900, 910, 913, 916, 918, 921, 1060), the record shows that these were scattered instances of soliciting a few individuals ranging over a period of several years, and leaves no doubt that the solicitation was neither of the magnitude nor of the open, organized, and mass character of that carried on for the Independent. Four witnesses called by the Independent testified they had not seen a single instance of solicitation on behalf of the Amalgamated (R. 851, 889, 873, 829), and the Board found, upon substantial evidence, that the immediate

interference, and support. *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 334–337; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268–269; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 273, 274; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 250, 262, enforcing 5 N. L. R. B. 930, 935; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 64, 68 (C. C. A. 2d), modified and affirmed, 309 U. S. 629.[26] The positions and au-

superior of Salmons, the most active Amalgamated organizer, was unaware that he engaged in solicitation (R. 1540; 1006, 154, 168, 1234). There is no indication that, as in the case of the Independent, the supervisors were aware of or countenanced solicitation for the Amalgamated.

[26] Accord: *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 475, 476 (C. C. A. 3d), modified on another point, No. 14, this Term, decided November 12, 1940; *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587, 590–591 (C. C. A. 3d); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223–224 (C. C. A. 3d), certiorari denied, No. 496, this Term; *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. (2d) 103, 105–106 (C. C. A. 4th); *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5th), certiorari denied, 310 U. S. 651; *H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. (2d) 843, 847 (C. C. A. 6th), pending argument, No. 73, this Term; *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 986 (C. C. A. 7th), certiorari denied. No. 152, this Term; *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 682 (C. C. A. 8th); *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 92–95 (C. C. A. 10th).

thority of these supervisory employees were clearly such as to make the company responsible for their activities in fostering the Independent.[27] *International Association of Machinists* v. *National Labor Relations Board,* No. 16, this Term, decided November 12, 1940. The attendance of Foreman Siskauskis and Foreman Grenis at the Independent's first general meeting (*supra,* p. 21) further reflects the company's illegal interference. *National Labor Relations Board* v. *Wallace Mfg. Co.,* 95 F. (2d) 818, 820 (C. C. A. 4th); *Cudahy Packing Co.* v. *National Labor Relations Board,* 102 F. (2d) 745, 748, 751 (C. C. A. 8th), certiorari denied, 308 U. S. 565.[28]

---

[27] Each of the foremen was in charge of an entire department (R. 932–936, 1025, 1070), supervising as many as 58 men (R. 935), directing and instructing them in their work (R. 983, 1026, 1052), and with power to recommend hiring and discharge (R. 931, 983, 1064, 1096). The foremen were relied on by the company for "maintenance of proper employee relations" (R. 1330–1331). Olson was assistant foundry superintendent as well as foreman of the steel floor (R. 285, 1046). Staskey hired employees in collaboration with department supervisors, and was "general contact man with the employees" (R. 992–993). Belov, although listed on the company's records as a non-supervisory employee (R. 1081), was regarded by the employees as their "night foreman" or "night boss" (R. 410, 416, 568, 630, 1220, 1225), occupied Day Foreman McKinney's office (R. 1220, 1221, 1223), distributed work and orders left by McKinney (R. 1223), gave employees new assignments when they finished a job (R. 1221), and was listed on the payroll as "night checker" (R. 1397–1409, 1094).

[28] The court below did not mention the most flagrant instance of supervisor solicitation, that by Foreman Siskaus-

The company's responsibility for the activities of these supervisory employees is not avoided by the finding of the court below, contrary to that of the Board (R. 1533–1534), that during 1936 Plant Manager Berry instructed the supervisory staff "to refrain from engaging in union activities" (R. 1569). The mere issuance of such instructions does not exhaust the employer's duty under the Act; he must, at the least, communicate his neutrality to the employees generally (*H. J. Heinz Co.* v. *National Labor Relations Board,* 110 F. (2d) 843, 847 (C. C. A. 6th), pending argument, No. 73, this Term; *Oughton* v. *National Labor Relations Board,* decided November 19, 1940 (C. C. A. 3d)), or take some other "effective means to stop repeated violations of the Act" (*Swift & Co.* v. *National Labor Relations Board,* 106 F. (2d) 87,

---

kis. It referred to Assistant Superintendent Olson's recruiting of a solicitor for the Independent as a simple act of explaining "to an employee the advantages of an inside union over an outside union" (R. 1571). It rejected, we submit improperly (*supra*, pp. 19–20), the findings relating to Employment Manager Staskey, and disposed of the participation by Foremen Nyberg and McKinney on the erroneous ground (*International Association of Machinists* case, *supra*) that they did not have power to hire and fire. The attendance of supervisors at the Independent's first membership meeting was likewise discounted. Foreman Grenis' attendance is not mentioned at all and the court below refers to Siskauskis as having attended "without participating" (R. 1571). There is evidence that Siskauskis voted concerning the adoption of the constitution prepared by the Independent's attorney (R. 435–436, see R. 1051, 1057, 1531); the Board made no finding upon this point.

93 (C. C. A. 10th)).[29] But even if the issuance of timely instructions of neutrality were sufficient to relieve the employer of responsibility, the evidence does not support the lower court's finding that they were timely issued in this case. Berry's initial testimony was that he discussed "labor" with his supervisory staff in 1936, and that after April 12, 1937, he gave definite instructions to the supervisory staff to remain neutral in union contests (R. 115[3]). On cross-examination Berry admitted, as the Board pointed out (R. 1533–1534), that he did not issue the instructions until after April 19, the date on which the Independent had concluded its membership drive and made its request for recognition (R. 1181–1182). Hence the Board properly concluded that the instructions were not issued until after they were "useless since a majority of the employees had joined the Independent, in a large part because of the attitude displayed by and the activities of the respondent's supervisors" (R. 1534). After the *fait accompli*, Berry's instructions plainly amounted to no more than lip service to the employees' right of free self-organization.

[29] There are no contrary decisions. See, also, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 44 (C. C. A. 6th); *National Labor Relations Board* v. *Falk Corporation*, 102 F. (2d) 383, 387 (C. C. A. 7th), Board order enforced in full, 308 U. S. 453; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 522–523.

The conclusion that the Independent was brought into being with the company's vigorous aid, as a successor to the company-dominated Plan, in order to defeat genuine self-organization, is further reinforced by the striking fact that dissolution of the Plan and request for recognition of the Independent were concurrent events to the very day and that the company accorded exclusive recognition to the Independent even before it had held a membership meeting or been formally organized (*supra*, pp. 20–21). Such a hasty grant of recognition is a commonly recognized indication of employer support. *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 171–172 (C. C. A. 3rd), certiorari denied, 308 U. S. 605; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254, 258 (C. C. A. 3rd), certiorari denied, 308 U. S. 615; *Continental Box Co.* v. *National Labor Relations Board*, 113 F. (2d) 93, 96 (C. C. A. 5th); *National Labor Relations Board* v. *Falk Corporation*, 102 F. (2d) 383, 388 (C. C. A. 7th), Board order enforced, 308 U. S. 453; *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 817–818 (C. C. A. 8th).

The Board's conclusion that the Independent was not the result of "a free choice of the employees" but of the company's interference with and domination of their efforts toward self-organization (R. 1534), has a far more substantial basis than that held sufficient in *National Labor Rela-*

tions Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. There the evidence established that some six months before the organization of the inside union disestablished by the Board, the management had made an unsuccessful attempt to form such a union. After a strike, which virtually destroyed the outside union involved in the case, an inside union, in the formation of which the employer was not shown to have had any direct hand, did emerge. The Board found that this organization was a result of the prior campaign and that its emergence could not be regarded as a product of the employees' free will. The Court held that there was "substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provision of Section 8 (2)" (306 U. S., at 262). Compare *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870–871 (C. C. A. 5th), certiorari denied, 310 U. S. 651; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254, 257–259 (C. C. A. 3d), certiorari denied, 308 U. S. 615. The company's "promotion efforts" in the present case thus went far beyond those proved in the *Fansteel* case and the Board's findings that the company dominated, interfered with, and supported the Independent are plainly supported by substantial evidence.

C. The order requiring the company to disestablish the Independent is valid

The Board's order required the company to cease and desist from its domination and interference, and to withdraw recognition from and completely disestablish the Independent as bargaining representative (R. 1553). Continued recognition of the Independent, the Board found, would constitute "an obstacle to collective bargaining through freely chosen representatives" (R. 1551). To draw this inference of fact was well within the Board's discretion. *National Labor Relations Board* v. *Pacific Greyhound Lines Inc.*, 303 U. S. 272, 275. As this Court has said, "The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236. In view of the fact that from the inception of the Plan in 1933 until the present day, the company's employees have been saddled continuously with a company-sponsored labor organization, and thus frustrated in their right to exercise an unimpeded choice of bargaining representatives, the Board was clearly entitled to find that "the effects of the long practice cannot be eliminated and the employes rendered

entirely free to act upon their own initiative without the complete disestablishment of" the Independent, the Plan's lineal and functional successor. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318. The "potent imponderables permeating this entire record" plainly warranted the Board's exercise of the power granted "the Board not the courts to determine how the effect of prior unfair labor practices may be expunged." *International Association of Machinists* v. *National Labor Relations Board*, No. 16, this Term, decided November 12, 1940.

II

There is substantial evidence supporting the Board's findings that the company discriminated against certain of its employees in violation of Section 8 (1) and (3) of the Act

The Board found that the company, in violation of Section 8 (1) and (3) of the Act, discharged Louis Salmons, Mike Karbel, Nick Cumorich, and

John Kalamarie because of their union membership and activity, and required Peter Solinko to join the Independent as a condition of employing his son, Frank Solinko (R. 1525–1526, 1532–1533, 1537–1540, 1542–1544, 1547–1550). The court below rejected these findings as unsupported by substantial evidence (R. 1569–1574). We think these findings have the requisite support and that the corresponding provisions of the Board's order were, therefore, entitled to full enforcement.[30]

Salmons.—Salmons, having become dissatisfied with the Plan under which he was an employee representative, began in September 1936 to form the Amalgamated (*supra*, p. 13). About September 15, with the assistance of seven other employees, he passed out 50 membership application cards bearing his name as "organizer" (R. 152–153, 189, 196, 1229, 1232–1233, 1412), some of which were

[30] The Board, as has been noted (*supra*, p. 6, note 5), ordered no affirmative relief with respect to Salmons or the Solinkos. The findings as to their discriminatory treatment, therefore, merely constitute additional support for the cease-and-desist provisions contained in paragraph 1 (b) of the Board's order (R. 1554), which the court below enforced (R. 1581), solely because of its acceptance of the findings as to Novak (R. 1572). We, nevertheless, discuss the validity of the Board's findings as to Salmons and the Solinkos, because they bear directly upon the findings of domination, interference with, and support of the Independent (*supra*, pp. 11–42), and because they constitute a background for consideration of the validity of the Board's findings that Karbel, Cumorich and Kalamarie were discharged in violation of Section 8 (1) and (3) of the Act.

turned over to Manager Berry (R. 188–189, 1129). On September 21, the day following the Amalgamated's first organizing meeting (R. 153), Salmons was summoned to Berry's office and summarily discharged. According to Salmons, Berry accused him of "spreading union propaganda," and when he replied that the law guaranteed him that right, Berry ordered him to leave the premises in "half an hour" (R. 153, 169). Salmons' testimony finds strong confirmation in that of Novak, who was separately discharged on the same day (*supra*, p. 13).[21] Novak testified that he similarly was charged by Berry with being "an organizer and instigator for a union" and given "half an hour" to depart (R. 217–218, 699). The Board, as the fact-finding body, clearly was justified in crediting the mutually supporting testimony of Salmons and Novak (R. 1538), despite the version of Berry and another company official, Conroy, who testified that Berry expressly placed the discharges on the ground that the men were "spending more of the company's time organizing than * * * doing your work" (R. 1132, 1122, 1124). Particularly was the Board justified in accepting the Salmons-Novak testimony in light of the fact that even in the company witnesses' ver-

[21] The Board's finding that Novak was discharged in violation of the Act because Berry believed, although erroneously, that he had joined and assisted the Amalgamated (R. 1539, 1550), was sustained by the court below (R. 1572) and hence is not in issue in this Court.

sion Berry also charged the men with "organizing" and gave them "thirty minutes" to leave the company property (R. 1122, 1124, 1132).

The company asserts that it discharged Salmons (as it likewise asserted unsuccessfully in the court below with respect to Novak) because he engaged in union activity during working hours to such an extent as to impair his efficiency. It is conceded that Salmons passed out some membership application cards during working hours (R. 196, 208, 1232) and that he spoke about the Amalgamated to men near whom he happened to be working (R. 171), but there is substantial support for the Board's view that Salmons' advocacy of the Amalgamated, not the use of company time, constituted the real cause of his dismissal. Compare *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 330–333. Indeed, Berry's own statement in discharging Salmons, that it was because he was "spreading union propaganda," in itself justifies the finding that the fatal offense in Berry's eyes was not the manner of advocacy but the subject matter—"union propaganda."

There is, moreover, other cogent evidence discrediting the contention advanced by the company. At the time Salmons was discharged, the company had no rule forbidding union activity during working hours. Froling testified that, as a Plan representative, he exercised the "privilege" of taking from 15 minutes to an hour at a time to confer with

the men during working hours (R. 815, 822). Salmons likewise, as a representative under the Plan, was permitted to leave his work and confer with the employees; moreover, about the same time he passed out the Amalgamated cards, he also passed out with company approval the constitution and bylaws of the Plan (R. 171, 196, 208, 213–214). The startling difference in treatment accorded Salmons as soon as he sought to further the Amalgamated instead of the Plan speaks for itself.

Nor does the record support the company's contention that Salmons' activities on behalf of the Amalgamated interfered with his work. All told, an aggregate of 50 cards was distributed by eight men including Salmons (*supra*, p. 45). It does not appear that all of these were distributed during working hours (See R. 1232). In passing out a card Salmons engaged in no conversation except to tell the recipient to take it home, sign, and return it (R. 189, 208, 1233). That this limited activity, as Salmons testified (R. 171, 210, 1229), caused no interference with the performance of Salmons' regular duties is plain from the fact that Salmons' foreman, Forss, admittedly was entirely unaware of Salmons' solicitation until Salmons told him of it after his discharge (R. 1006–1007; see also R. 154, 168, 1234).

Further confirmation that Salmons' elimination was motivated by hostility to his union views is supplied by the company's departure from its usual policy (R. 1154) of warning an employee

before discharging him. The Board found that Salmons received no warning or reprimand prior to his sudden dismissal (R. 1540).[32] Salmons had worked for the company for 14 years (R. 142); his efficiency is attested by the fact that he was the highest paid man in his department (R. 173). It passes belief that the company would peremptorily dismiss an employee of such long standing without any warning (and with the curt command to leave the plant in "half an hour") simply because of his distribution of a small number of cards during working hours; had the cards related to some other matter than the initiation of an outside union, it seems plain that Salmons would not have suffered the extreme penalty of discharge.[33]

Final proof of the discriminatory nature of the treatment of Salmons is afforded by the company's contrasting failure to impose any penalty or re-

[32] Berry's testimony that several weeks earlier he had observed Salmons talking to the sand slinger and told him to "keep moving" (R. 1131–1132, 1154), even if true, scarcely constitutes a warning of discharge. Salmons specifically denied this alleged incident and testified that throughout his employment he had never received any warning or reprimand whatever (R. 1228–1229, 210–211). The sand slinger did not testify. On this record the Board's finding that no warning was given to Salmons (R. 1540) was obviously proper.

[33] As the Seventh Circuit has itself said, "Section 8 (3) * * * refers to antiunion discrimination, that is, to a different treatment accorded union employees solely because of their union memberships or activities." *Montgomery Ward and Co., Inc.*, v. *National Labor Relations Board*, 107 F. (2d) 555, 564.

straint upon the organizers for the Independent when, thereafter, they openly engaged, during working hours, in far more active and widespread solicitation (*supra,* pp. 15–17). This, taken together with the hostility to outside unions voiced by Berry shortly before Salmons' discharge (*supra,* pp. 12–13), plainly warranted the Board in concluding that the company's true motivation in ridding itself of Salmons was not his use of company time but the fact that the "union propaganda" which he was "spreading" was not the company-favored brand.[34]

Peter Solinko and Frank Solinko.—We have heretofore set forth (*supra,* pp. 19–20) the evidence supporting the Board's finding (R. 1532–1533) that in April 1937, Employment Manager Staskey conditioned the employment of Frank Solinko upon the acceptance of membership in the

[34] The court below, rejecting the Board's finding that Salmons was ousted because of his union activities, made no reference whatever to the Board's subsidiary findings and the evidence supporting them. It stated only that the Board should have accepted the testimony of Berry and Conroy that Salmons had been discharged for soliciting on company time (R. 1570–1571). The court also referred to the testimony of Foreman Forss as supporting its finding (R. 1570–1571). However, Forss did not testify concerning the reason for the discharge of Salmons (R. 1005–1011; see also R. 153–154, 168, 1234). Forss testified that he had never seen Salmons engaged in solicitation and was unaware that Salmons had solicited until Salmons told him of it after his discharge (*supra,* p. 48).

Independent by his father, Peter Solinko. This conduct of the company, as the Board found (R. 1550), clearly constituted discrimination in regard to the terms and conditions of employment of Peter Solinko and in regard to the hire of Frank Solinko, encouraging membership in the Independent and discouraging membership in the Amalgamated. Hence it violated Section 8 (1) and (3) of the Act.

Karbel and Cumorich.—Karbel and Cumorich were employed on the night shift which Night Boss Belov, upon instructions from Day Foreman McKinney, solicited for membership in the Independent in April 1937 (*supra*, pp. 18–19). Karbel and Cumorich refused to join at Belov's solicitation (R. 410–411, 561, 568, 1225) and in the latter part of April became members of the Amalgamated (R. 409–410, 562, 567). On May 19, upon orders from Foreman McKinney, they were discharged by Belov.

The company's claim is that Karbel and Cumorich were discharged for inefficiency. McKinney testified that he had repeatedly warned both men that their work was unsatisfactory (R. 1076–1077, 1092) and that he ordered their discharge when time studies demonstrated that the two men were inefficient (R. 1073, 1077, 1419). Both Karbel and Cumorich, on the other hand, testified that neither McKinney nor anyone else had ever warned them

or criticized their work (R. 417, 563, 1218–1219, 1226); they further testified that Night Boss Belov, at the time of their discharge, stated that they were good workmen and that he did not know the reason for their discharge (R. 411–412, 415, 562–563, 1222, 1227). Belov did not take the stand to deny this. The Board, crediting the testimony of Karbel and Cumorich and rejecting that of McKinney, found that Karbel and Cumorich had never been warned that there was anything wrong with their work (R. 1544).

The Board also pointed out that there were certain obvious defects in the time studies (R. 1543–1544). The Cumorich study (Resp. Exh. 32, R. 1419) is not a relative comparison of his work with that of other men but an efficiency rating based on the time taken to perform certain operations as against a fixed "manit" or "allowed minutes" time (Resp. Exh. 30, R. 1415). But whereas this rating was based on the time taken to do cleaning and grinding operations, Cumorich worked principally as a common laborer (R. 409, 415, 1219, 1282) so that his efficiency could not properly be rated by this test. The company's expert, Peters, who had made the study, was completely confused and unable to explain this inconsistency (R. 1032–1033, 1282).

The Karbel study is equally unpersuasive. This analysis purports to compare Karbel with 5 other employees doing allegedly similar work, and also to rate him on an absolute "manit" scale (Resp.

Exh. 31, R. 1419). The men with whom he was compared, however, were all on the day shift (R. 1279), while Karbel was on the night shift. Foundry Superintendent Skeates testified that to make a fair comparison it would be necessary to compare Karbel with the men "working on that same crew that same night" (R. 983), and no explanation was given why such a comparison was not made. Further, some of the men with whom Karbel was compared were employed at a higher hourly rate of pay, implying an acknowledged superiority (R. 1273). The work compared was also somewhat dissimilar, with different piecework rates applicable to different jobs (R. 1275). The Board specifically found that the time studies do not "reflect with any degree of precision the relative efficiency of Karbel or Cumorich. * * * we do not believe that respondent discharged either man because of anything disclosed by Peters' time study" (R. 1544).

On this evidence we submit that the Board was entirely justified in concluding that inefficiency was not the true reason for the discharge of Karbel and Cumorich. As the court held in *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. (2d) 291, 293 (C. C. A. 4th):

> It must be remembered, in this connection, that the question involved is a pure question of fact; that, in passing upon it, the Board may give consideration to circumstantial evidence as well as to that which is direct:

that direct evidence of a purpose to violate the statute is rarely obtainable; and that where the finding of the Board is supported by circumstances from which the conclusion of discriminatory discharge may legitimately be drawn, it is binding upon the courts, as they are without power to find facts or to substitute their judgment for that of the Board.

The significant coincidence in time between the men's resistance to the efforts of McKinney to convert them to the company's choice of representatives—the Independent, and McKinney's decision to make time studies of their work; the absence of any claim of inefficiency or any time study during Karbel's previous seven years of employment (R. 560–561, 1033–1034); and the statement of their immediate superior, Night Boss Belov, that they were good workmen and that he did not know the reason for their discharge, constitute persuasive evidence from which the Board reasonably could draw the inference that their union views, not any lack of efficiency, constituted the actual cause of their dismissal.[35]

[35] The court below, in rejecting the Board's findings as to Karbel and Cumorich, disposed of their refusal of Night Boss Belov's solicitation to join the Independent, carried out upon Foreman McKinney's orders, with the observation that "Karbel and Cumorich testified that an employee had asked them to join the Independent" (R. 1572). The court's further statement that there was no evidence showing that the company was aware of their membership in the Amal-

Kalamarie.—Kalamarie was another employee who rejected the solicitation of Foreman McKinney and Night Boss Belov on behalf of the Independent (*supra,* pp. 18–19; R. 622–623, 630–632). In March 1937 Kalamarie joined the Amalgamated and became an active figure therein, enlisting other employees, and serving on the union grievance committee (R. 621–622, 627). In the middle of November 1937, as a member of that committee, he called on Plant Manager Berry to protest the lay-off of a union employee (R. 627, 1164). A few days after this visit, Kalamarie's immediate superior, Night Boss Belov, received written instructions from Day Foreman Morley to lay Kalamarie off for a week if his work showed no improvement (R. 627–628, 635, 637, 1025–1026). About two weeks later, in the course of a general reduction of force, Kalamarie was permanently laid off, allegedly for lack of work as a welder (R. 624, 954).[36]

As the Board recognized (R. 1548), Kalamarie's services as a *welder* were no longer needed at the time of his layoff. But until his promotion to welding a few months earlier, Kalamarie for a

---

gamated takes no account of the Board's findings (*supra,* p. 14), upheld by the court (R. 1572), that the company's labor spy was at that time a member and committeeman of the Amalgamated and attended its meetings (R. 112–113, 137–138, 145–146).

[36] The company has never contended that Kalamarie's alleged unsatisfactory work—which Kalamarie denied (R. 628, 635)—had anything to do with his lay-off.

year and a half had been an acetylene burner (R. 624–625, 628, 630, 954, 1208), and when promoted he was specifically told that he could return to acetylene burning if his work as a welder ran out (R. 1209). Nevertheless, three men junior to Kalamarie as acetylene burners, two of whom he had "broken in," were retained when he was let go.[37] Kalamarie promptly protested to Foundry Superintendent Skeates that he was entitled to be kept on as an acetylene burner in preference to those men (R. 624–625). Skeates did not deny Kalamarie's priority, but assured Kalamarie that the other acetylene burners also were to be laid off in "a day or so" (R. 625). Actually, however, they were retained until shortly before the hearing, more than 3 months later (R. 625, 1374).

In purported explanation of the failure to retain Kalamarie, company witnesses testified that the company followed a policy of "seniority within the occupation" under which it did not "step back" employees to positions formerly held. But the foundry superintendent, Skeates, who admittedly had complete authority over questions of seniority in the foundry (R. 981, 984), testified that the seniority policy was "very tentative" (R. 986),

[37] Thiele, an acetylene burner or "cut-off" man (R. 1211–1213, 1374, 954); Kouna, who worked as an acetylene burner, though listed as a "cut-off" laborer (R. 625, 1020–1021, 1211–1213, 1374); and Melcoskey, who worked part of the time as an acetylene burner, though listed as a chipper (R. 625, 959–960, 1020–1021, 1374).

that under company practice an employee retained his original seniority standing if promoted to another position in the same department (R. 967), and that in the event of a lay-off he would "step back" an employee within the department if the employee requested it (R. 985–986.[38] His attempted explanations that Kalamarie, nevertheless, was not "stepped back" to the position of acetylene burner because he "didn't ask to be put back" (R. 976–977, 991, see also R. 1089) and because there were no acetylene burners junior to Kalamarie (R. 978, 991), are in conflict with the facts (*supra*, p. 56) as found by the Board (R. 1548).

In this state of the evidence, the Board was clearly entitled to reject the company's claim that a policy of "seniority within the occupation" compelled it to lay off Kalamarie, and to find as it did that Kalamarie would not have been laid off had not the company been anxious to rid itself of a union leader. Kalamarie's visit to Berry as a committeeman was promptly followed by a succession of steps looking toward his lay-off, first on the ground of unsatisfactory work, then on the different ground of slack work. His claim of seniority as an acetylene burner was rejected initially upon the false ground that the men in that category

[38] Skeates also conceded that the steel cleaning room in which Kalamarie continuously worked both as acetylene burner and welder (R. 621, 628, 630, 1209, 1383) constituted a single department (R. 974, 980, 986, 989).

also were to be laid off; and finally the company fell back on the equally groundless claim that Kalamarie had forfeited his seniority through promotion. That this series of devices was but another instance of the company's demonstrated hostility to the Amalgamated, was an inference justified by the record. That conclusion is reinforced, as the Board noted (R. 1548), by the striking fact that Kalamarie was the only employee hired as early as 1935 (R. 1383, 621, 954) who was laid off in any department of the foundry (Resp. Exhs. 6–19, R. 1383–1392).[30] The Board's finding that Kalamarie's ostensible lay-off was actually a discharge for union activity is, we submit, supported by substantial evidence.

Upon the findings of violation of Section 8 (1) and (3) of the Act the validity of the Board's order requiring the company to cease and desist from its unfair practices and to reinstate Karbel, Cumorich, and Kalamarie with back pay, is not open to question. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318.

---

[30] Manager Berry testified that the company decided at the time of the 1937 recession to lay off its employees hired in 1937 before laying off those hired in 1936, and those hired in 1936 before those hired in 1935 (R. 1169–1170).

CONCLUSION

It is respectfully submitted that the judgment of the lower court, insofar as it fails to enforce the order of the Board against the company, should be reversed, and the cause remanded with directions that the order be enforced in full.

FRANCIS BIDDLE,
Solicitor General.

CHARLES FAHY,
Assistant Solicitor General.

THOMAS E. HARRIS,
Special Assistant to the Attorney General.

ROBERT B. WATTS,
[redacted] General Counsel,

LAURENCE A. KNAPP,
Assistant General Counsel,

MORRIS P. GLUSHIEN,
Attorney,
National Labor Relations Board.

NOVEMBER 1940.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.
>
> * * * * * *
>
> SEC. 10.
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239

and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1940

Blank Page